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CLASS ACTIONS IN ILLINOIS: TOWARD A MORE ATTRACTIVE FORUM FOR THIS ESSENTIAL REMEDY

*Kevin M. Forde**

Presently, there is no statute governing the maintenance of class actions in Illinois. As a result, there is a movement to codify present case law and enact provisions where case law is lacking. In this Article, the author delineates the requirements for bringing a class action as established by Illinois court decisions. The author believes a codification of class action law is inevitable and desirable. In conclusion, he proposes a model rule that attempts to establish guidelines for the adjudication of class actions.

Class actions have been the subject of exhaustive litigation and debate over the past few years. Although this litigation tool was judicially recognized and approved in English common law as early as the seventeenth century,[1] it was not until the past decade that its full potential was appreciated. This emergence, particularly in the federal courts, may be attributed to two developments. First, a whole new era of litigation has developed in subject areas which are particularly suited to class litigation such as antitrust,[2] securities,[3] fraud,[4] civil rights and equal opportunity statutes,[5] pension and wage disputes,[6] and the whole spectrum of consumer cases.[7] Second, these substantive law developments

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1. ILLINOIS INSTITUTE FOR CONTINUING LEGAL EDUCATION, CLASS ACTIONS §1.2 (1974) [hereinafter cited as IICLE].

2. *See, e.g., In re* Coordinated Pretrial Proceedings in Antibiotic Antitrust Actions, 333 F. Supp. 267 (S.D. N.Y. 1971); IICLE, *supra* note 1, at §8.4.

3. *See, e.g.,* Green v. Wolf Corp., 406 F.2d 291 (2d Cir.), *cert. denied*, 395 U.S. 977 (1968); Bernfeld, *Class Actions and Federal Securities Laws*, 55 CORNELL L. REV. 78 (1969). Actions under the securities laws represent the largest single group of class action cases in the federal courts. *See* IICLE, *supra* note 1, at §8.3.

4. *See, e.g.,* Vasquez v. Superior Court, 4 Cal.3d 800, 484 P.2d 964, 94 Cal. Rptr. 796 (1971).

5. *See, e.g.,* Rodriquez v. East Texas Motor Freight, 505 F.2d 40 (5th Cir. 1974); Williams v. Matthews Co., 499 F.2d 819 (8th Cir. 1974).

6. *See, e.g.,* Teachers Ins. & Annuity Ass'n of America v. Beame, 67 F.R.D. 30 (S.D. N.Y. 1975).

7. Vasquez v. Superior Court, 4 Cal.3d 800, 484 P.2d 964, 94 Cal. Rptr. 796 (1971); Daar v. Yellow Cab Co., 67 Cal.2d 695, 433 P.2d 732, 63 Cal. Rptr. 724 (1967).

arose contemporaneously with the liberalization of the federal procedural rules governing class actions.[8]

However, proponents of class litigation have suffered serious setbacks in the federal courts, particularly as a result of *Zahn v. International Paper Co.*,[9] requiring, in cases of diversity jurisdiction, that each class member's claim exceed the jurisdictional minimum of $10,000,[10] and *Eisen v. Carlisle & Jacquelin*,[11] requir-

8. Class actions are governed by Federal Rule 23. FED. R. CIV. P. 23. The essential prerequisites are found in subsection (a) of the rule which provides that a member of a class may sue or be sued on behalf of the class if:

(1) the class is so numerous that joinder of all members is impracticable,

(2) there are questions of law or fact common to the class,

(3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and

(4) the representative parties will fairly and adequately protect the interests of the class.

In addition to the above recited prerequisites, the proposed action must also properly fall within one of the three categories listed in subsection (b) of Rule 23:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class; or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interest; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

9. 414 U.S. 291 (1973).

10. *Id.* at 300. *Zahn* v. *Int'l Paper Co.*, was a diversity action brought on behalf of 200 lake front property owners in Vermont. The plaintiffs charged that the defendant, International Paper Company of New York, illegally permitted discharges from its paper plant to flow into a creek which later carried the pollutants into the lake adjoining the plaintiffs' property, thereby damaging the value and utility of their property. The named class representatives alleged individual damages in excess of the federal jurisdictional amount

ing that notice be given all identifiable class members and that the party seeking class adjudication initially bear the burden of this notice.[12] Consequently, access to the federal courts has been curtailed dramatically and a corresponding increase in the volume of class action litigation in the state courts can be expected.

Unlike the federal practice and the practice in most states, there is no specific class action statute or rule in Illinois.[13] The only reference to the subject is found in section 52.1 of the Civil Practice Act, which provides that:

> An action brought on behalf of a class shall not be compromised or dismissed except with the approval of the court and, unless excused for good cause shown, upon notice as the court may direct.[14]

Thus, Illinois class actions have developed solely as a result of case law.[15] While a few cases are difficult to reconcile, a clear pattern of prerequisites emerges when the facts of the most significant cases are analyzed.[16] However, this case-by-case develop-

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of ten thousand dollars required in diversity cases. However, the unnamed members of the class could not show damages exceeding this jurisdictional amount. The plaintiffs contended that the requirement of ten thousand dollars need be met only by the named representative parties who could then prosecute lesser claims on behalf of the absent class members.

The Supreme Court held that, under jurisdictional limitations of the federal courts as established by Congress, each plaintiff and each absent class member must individually possess a claim in excess of the jurisdictional minimum. If the claim of one of the plaintiffs qualifies while the claim of another plaintiff or an absent class member does not, the non-qualifying claimant is to be dismissed from the action. *Id.* at 300.

11. 417 U.S. 156 (1974).

12. *Id.* at 178-79. In *Eisen*, the plaintiff brought a class action against a number of brokerage firms alleging conspiracy to charge excessive commissions in the handling of "odd-lot" securities. The class whom plaintiff purported to represent consisted of approximately 3,750,000 customers of brokers. Evidence showed that notice of mailing would cost $400,000. The *Eisen* court held that individual notice must be given to all identifiable members of the class and that the cost of this notice initially must be borne by the plaintiff or person seeking to represent the class.

13. Landesman v. General Motors Corp., 42 Ill.App.3d 363, 356 N.E. 2d 105 (1st Dist. 1976); Gaffney v. Shell Oil Co., 19 Ill.App.3d 987, 989-90, 312 N.E.2d 753, 756 (1st Dist. 1974); Starrs, *The Consumer Class Action—Part II: Considerations of Procedure*, 49 B.U. L. REV. 407, 425-28 (1969).

Class actions in the federal courts are governed by Federal Rule 23. *See* note 8 *supra*. Similarly, some states have adopted rules or legislation governing class actions. *See, e.g.*, N.Y. CIV. PRAC. LAW & R. §1005; CAL. CIV. PRAC. CODE §382.

14. ILL. CIV. PRAC. ACT §52.1.

15. *See* note 13 *supra*.

16. *See* text accompanying note 19 *infra*.

ment has left considerable discretion with the trial courts to work out the problems and permit class actions when they feel the case can proceed in a practical and efficient manner. Furthermore, when the trial court finds the essential prerequisites present, these findings will not be disturbed unless a reviewing court determines that they are contrary to the manifest weight of the evidence.[17]

Because of the uncertainty inherent in this case law development and the binding effect of the trial court findings, it is strongly advocated in many quarters that a statute or court rule be adopted to provide specifically for the maintenance of class actions in Illinois.[18] In view of the force of this movement, the adoption of some formal rule seems inevitable. This prospect has caused considerable concern among practicing lawyers who generally have a well-deserved fear of the efforts of legislators and rule-makers to "reform," "improve" or "clarify" any reasonably defined area of law. However well-founded these fears may be, it is submitted that, drawing on existing case law and the federal experience with Rule 23, a sound and workable statute or rule can be adopted which may add certainty and predictability to this elusive subject without doing violence to the second case law which has developed in Illinois. The demonstration of this proposition requires discussion of the current state of Illinois law, a

17. Perlman v. First Nat'l Bank of Chicago, 15 Ill.App.3d 784, 798, 305 N.E.2d 236, 247 (1st Dist. 1973), *appeal dismissed*, 60 Ill.2d 529, 331 N.E.2d 65 (1975); Ross v. 311 North Central Ave. Bldg. Corp., 130 Ill.App.2d 336, 346, 264 N.E.2d 406, 412 (1st Dist. 1970). This view is consistent with federal practice. *See, e.g.*, Appleton Elec. Co. v. Advance-United Expressways, 494 F.2d 126, 139 (7th Cir. 1974).

18. In the last session of the General Assembly, a bill was introduced by Representative Arthur Berman which proposed adoption of Federal Rules 23, 23.1 and 23.2 as new paragraphs 57.2, 57.3 and 57.4 of the Illinois Civil Practice Act. Representative Berman candidly advised the members of the House that this Bill was merely a convenient starting point. Additionally, he stated that it was his hope that legislative hearings might be conducted as to the merits of either maintaining the law in its present form or adopting a formal statute on the subject. Significantly, there was no enthusiasm for a verbatim adoption of the federal rule in general and the notice provisions of that rule in particular. Mr. Berman has since been elected to the Senate and is expected to introduce a similar Bill in that Chamber during the current session.

The Illinois Supreme Court Rules Committee is also in the process of proposing a rule on class actions. The final proposal by the Committee as submitted to the court is not yet available for comment, but it is anticipated that the supreme court will invite comments prior to the adoption of the rule. Finally, the Chicago Bar Association's Committee on the Development of the Law has an active subcommittee considering the need for a class action rule in Illinois.

comparison to the federal experience, and a consideration of some alternatives.

CURRENT PREREQUISITES UNDER ILLINOIS LAW

To maintain a class action suit in an Illinois court the proponent of class litigation must establish that:

1. The potential class consists of a number of members too numerous to be individually joined in the action.
2. The named parties adequately represent the class.
3. There are common questions of fact or law which are the dominant and central issues in the case so that the class members have a common interest in the subject matter of the suit.
4. The class action is an appropriate method to dispose of the issues raised in the controversy.[19]

These prerequisites in many respects parallel those of class adjudication under Federal Rule 23 (a) and 23 (b)(3). Unlike the federal rule, however, notice to the entire identifiable class is not required. Moreover, Illinois state courts do not suffer the jurisdictional limitation relating to the amount in controversy which applies in federal courts.

The Class is So Numerous that Joinder of All Members Individually is Impracticable

The proponent of class adjudication in Illinois must show that, "[t]he number of those interested in the subject of the litigation is so great that their joinder as parties in conformity to the usual rules of procedure is impracticable."[20] This requirement is the simplest to satisfy and seldom is a disputed issue. It is derived essentially from early equity practice[21] and is also found in the Federal Rules[22] as a prerequisite to a class action.

However, the impracticability of joinder is not a simple numerical proposition. It depends upon a number of other considera-

19. Harrison Sheet Steel Co. v. Lyons, 15 Ill.2d 532, 155 N.E.2d 595 (1959); Newberry Library v. Board of Educ., 387 Ill. 85, 55 N.E.2d 147 (1944); Landesman v. General Motors Corp., 42 Ill.App.3d 363, 356 N.E.2d 105 (1st Dist. 1976); Kimbrough v. Parker, 344 Ill.App. 483, 101 N.E.2d 617 (1st Dist. 1951).

20. Winger v. Chicago City Bank & Trust Co., 394 Ill. 94, 103, 67 N.E.2d 265, 273 (1946), *quoting* Hansberry v. Lee, 311 U.S. 32, 41 (1940); Midway Tobacco Co. v. Mahin, ___ Ill. App. 3d ___, 356 N.E.2d 909 (1st Dist. 1976).

21. *See* note 1 *supra*; Smith v. Swormstedt, 57 U.S. 288 (1853).

22. FED. R. CIV. P. 23(a). *See* note 8 *supra*.

tions including the location of claimants,[23] the amount of their claims, their ability to bring suit on their own behalf, and the likelihood that they might do so.[24] It is anticipated that in any case in which there is a substantial number of potential claimants, and the individual amounts of their claims are relatively small, an Illinois court will exercise its discretion to permit the case to proceed as a class action.[25] Under the federal rule, a class with only eighteen members has been found to be so numerous as to make joinder impracticable.[26] On the other hand, under differing circumstances, proposed classes of sixteen,[27] forty[28] and even 840[29] have been found insufficient in number to meet the requirement of impracticability of joinder.

This issue rarely is discussed in Illinois cases, generally because a proponent of class adjudication would not consider bringing a case where there was not a substantial number of claimants. If a proposed class consists of only eighteen or forty proposed claimants seeking money damages, it may not be feasible, from an economic point of view, to bring the action on behalf of the class. If injunctive relief is the principal object of the suit, one party can generally accomplish the desired result without the need for class adjudication. On the other hand, where there are a small number of claimants with substantial claims, joinder of all in one case may not be impracticable. All of these considerations call for a

23. Where the potential class members are all located within the same area, joinder is less of a problem than where the parties are widely scattered. *Compare* Bennett v. United States, 266 F. Supp. 627, 629 (W.D. Okla. 1965), *with* Seligson v. Plum Tree, Inc., 55 F.R.D. 259, 263 (E.D. Pa. 1972).

24. *See* Dolgow v. Anderson, 43 F.R.D. 472 (E.D. N.Y. 1968); Donelan, *Prerequisites to a Class Action Under New Rule 23, The Class Action—A Symposium*, 10 B.C. IND. & COM.L. REV. 527, 531 (1969); Frankel, *Amended Rule 23 From a Judge's Point of View*, 32 ANTITRUST L.J. 295, 298 (1966); Harte & Forde, *Practical Problems in Handling Class Actions*, 15 TRIAL L. J. 549, 553 (1971). *See also* WRIGHT & MILLER, FEDERAL PRACTICE & PROCEDURE §1762 (1972).

25. *See* Harrison Sheet Steel Co. v. Lyons, 15 Ill.2d 532, 155 N.E.2d 595 (1959); Smyth v. Kaspar Am. State Bank, 9 Ill.2d 27, 136 N.E.2d 796 (1956); Magro v. Continental Toyota, Inc., 37 Ill.App.3d 1, 344 N.E.2d 675 (1st Dist. 1976); Kimbrough v. Parker, 344 Ill.App. 483, 101 N.E.2d 617 (1st Dist. 1951).

26. *See, e.g.*, Cypress v. Newport News Gen. & Nonsectarian Hosp. Ass'n, 375 F.2d 648 (4th Cir. 1967).

27. *See, e.g.*, DeMarco v. Edens, 390 F.2d 836 (2d Cir. 1968).

28. *See, e.g.*, Swanson v. American Consumer Indus., 288 F. Supp. 60, 61 (S.D. Ill. 1968).

29. *See, e.g.*, Utah v. American Pipe & Constr. Co., 49 F.R.D. 17, 18 (C.D. Cal. 1969).

balancing of the competing factors in a given case. In practice, disputes on this subject have been rare if not non-existent.

The Named Parties Must Adequately Represent the Class

Adequate representation is essential to the maintenance of a class action.[30] It is the method by which compliance with due process requirements is guaranteed. Thus, lack of adequate representation is one of the few grounds which will permit a collateral attack upon a class action judgment.[31]

The critical test to determine whether the named parties adequately represent the class has been stated as follows:

> [W]hether those sought to be bound as members of the class are in fact adequately represented by the parties who actually participate in the conduct of litigation in which members of the class sought to be bound, are not present as parties . . . .[32]

Essentially, the determination involves a consideration of whether the representative interests are compatible with, and not antagonistic to, those of the class and whether the representative parties will put up a "real fight."[33] Thus, neither the number of representative parties nor the size of their claims is controlling.[34]

To establish adequacy of representation, the proponent of class adjudication first must show that the claims are common.[35] This assures that the class representative will adequately assert the claim of those on whose behalf he seeks to act. The courts have reasoned that the interests of absent class members will be protected so long as the representative parties are vigorous advo-

30. Newberry Library v. Board of Educ., 387 Ill. 85, 90-91, 55 N.E.2d 147, 151 (1944); Kimbrough v. Parker, 344 Ill.App. 483, 486, 101 N.E.2d 617, 618 (1st Dist. 1951).

31. Gonzales v. Cassidy, 474 F.2d 67 (5th Cir. 1973); Newberry Library v. Board of Educ., 387 Ill. 85, 55 N.E.2d 147 (1944).

32. Newberry Library v. Board of Educ., 387 Ill. 85, 90-91, 55 N.E.2d 147, 151 (1944); Kimbrough v. Parker, 344 Ill.App. 483, 486, 101 N.E.2d 617, 618 (1st Dist. 1951).

33. Dolgow v. Anderson, 43 F.R.D. 472, 494 (E.D. N.Y. 1968); State Life Ins. Co. v. Board of Educ., 394 Ill. 301, 308, 68 N.E.2d 525, 529 (1946).

34. Booth v. General Dynamics Corp., 264 F. Supp. 465 (N.D. Ill. 1967). *See also* Hohmann v. Packard Instrument Co., 399 F.2d 711 (7th Cir. 1968) (two of 800 purchasers of securities who acquired 700 of 100,000 shares offered for sale were held to fairly and adequately represent the class); Perlman v. First Nat'l Bank of Chicago, 15 Ill. App.3d 784, 305 N.E.2d 236 (1st Dist. 1973) (three borrowers on behalf of thousands).

35. Fiorito v. Jones, 39 Ill.2d 531, 542-43, 236 N.E.2d 698, 705 (1968); Harrison Sheet Steel Co. v. Lyons, 15 Ill.2d 532, 537, 155 N.E.2d 595, 598 (1959); Perlman v. First Nat'l Bank of Chicago, 15 Ill.App.3d 784, 803, 305 N.E.2d 236, 250 (1st Dist. 1973).

cates for common rights shared with the class.[36] In addition to showing this common interest, the proponent must establish that he is capable of acting as champion on behalf of the class.[37]

Obviously, there is a direct relationship between the adequacy of representation prerequisite and the separate prerequisite requiring that there be common questions of fact or law in the litigation. It is the litigation of the common questions which guarantees in part that the representation will be adequate. In determining adequacy of representation, however, it is important to stress that there need not be a total identity of the claims as between the representative party and the absent class members, so long as the named parties share a common interest in establishing the essential elements sought to be litigated on behalf of the class.[38] It may well be that absent class members have additional claims, or are subject to additional defenses. However, these facts need not defeat the attempt to adjudicate on behalf of a class.[39] Again, the judicial evaluation of the quality of the representation rests particularly within the sound discretion of the trial judge.

There must be Common Questions of Fact or Law which are Dominant and Pervasive.

Any action contemplated as a class action must present circumstances giving rise to questions of fact or law common to all the parties in the alleged class.[40] Either the claims of all parties must be based on the common application of a statute or regulation, or all parties and class members must be aggrieved by the same or similar misconduct.[41] In order to adjudicate on behalf of the class, however, it is not enough for the proponent to show that

36. *Id.*

37. *See* Gaffney v. Shell Oil Co., 19 Ill.App.3d 987, 991-92, 312 N.E.2d 753, 757 (1st Dist. 1974).

38. *See, e.g.*, Smyth v. Kaspar Am. State Bank, 9 Ill.2d 27, 136 N.E.2d 796 (1956).

39. *Id.*

40. *See* Hagerty v. General Motors Corp., 59 Ill.2d 52, 319 N.E.2d 5 (1974), *appeal dismissed*, 60 Ill.2d 529, 331 N.E.2d 65 (1975); Harrison Sheet Steel Co. v. Lyons, 15 Ill.2d 532, 155 N.E.2d 595 (1959); Perlman v. First Nat'l Bank of Chicago, 15 Ill.App.3d 784, 305 N.E.2d 236 (1st Dist. 1973). *See also* Gordon, *The Common Question Class Suit Under The Federal Rules And In Illinois*, 42 ILL. L. REV. 518 (1947).

41. *See* Kruse v. Streamwood Util. Corp., 34 Ill.App.2d 100, 180 N.E.2d 731 (1st Dist. 1962); Kimbrough v. Parker, 344 Ill.App. 488, 101 N.E.2d 617 (1st Dist. 1951). *See also* cases cited in note 40 *supra*.

some issues are common to all class members. Rather, the proponent must show that the common issue of fact or law are dominant and pervasive, as opposed to being ancillary to the central issues in the case.[42]

This prerequisite is similar to that required under Federal Rule 23 (b)(3). Under 23 (b)(3), before an action may be litigated as a class action, the proponent must establish that there are questions of law or fact common to the class that predominate over those affecting only certain individual members.[43] Thus, the issue arises as to what constitutes a dominant and pervasive issue.

The determination of whether the common issues are dominant and pervasive requires an analysis of all issues presented by the case, segregating the common questions from those that may affect only certain members of the class.[44] The analysis necessary for this determination was well expressed by Justice Schaefer in *Harrison Sheet Steel Co. v. Lyons.*[45] In that case, certain customers of Harrison brought suit to obtain a refund of certain payments collected from them by Harrison, as payments under the Retailers' Occupation Tax Act.[46] Previously, Harrison had successfully challenged the legality of the tax and obtained a refund of taxes paid. However, Harrison refused to refund the taxes to the retail customers who had actually paid the tax. Consequently, an action was brought on behalf of the hundreds of customers that dealt with Harrison in separate and isolated transactions claiming their right to the money retained by Harrison.

Though at times mislabeled a "tax" case, the court characterized the action as a restitution action between private individuals, presenting the common question of "whether the Company, which took money from its customers upon the ground that a tax was due . . . can resist the claim of those customers for restitution."[47] Having characterized this as a restitution action, the common questions of fact and law were neatly posed. Thus,

42. *See* Rosen v. Village of Downers Grove, 19 Ill.2d 448, 167 N.E.2d 230 (1960); Harrison Sheet Steel Co. v. Lyons, 15 Ill.2d 532, 155 N.E.2d 595 (1959).

43. *See* note 8 *supra.*

44. *See* Rosen v. Village of Downers Grove, 10 Ill.2d 448, 456, 167 N.E.2d 230, 235 (1960); Harrison Sheet Steel Co. v. Lyons, 15 Ill.2d 532, 538, 155 N.E.2d 595, 598 (1959); Smyth v. Kaspar Am. State Bank, 9 Ill.2d 27, 44, 136 N.E.2d 796, 805 (1956); Perlman v. First Nat'l Bank of Chicago, 15 Ill. App.3d 734, 305 N.E.2d 236, 247 (1st Dist. 1973).

45. 15 Ill.2d 532, 155 N.E.2d 595 (1959).

46. ILL. REV. STAT. ch. 120, §§440-453 (1975).

47. 15 Ill.2d at 536, 155 N.E.2d at 597.

the court avoided what it saw as problems of "individual proof" that would have been necessary had this been an action by the customers against the state to obtain repayment from the state under what it viewed as the "rigid" refund provisions of the Retail Sales Act.[48]

The court's apprehension about the problem of individual proof posed by tax cases was misplaced. In *Fiorito v. Jones*,[49] the court upheld the litigation of a state-wide tax as a class action despite problems of individual proof. *Fiorito* involved an action challenging the constitutionality of the 1967 Amendments to the Occupations Service Act[50] and included the claims of 43,000 class mem-

48. ILL. REV. STAT. ch. 120, §§440-453 (1975). Under that Act each claimant must establish (a) that the claimant bore the burden of the tax, and (b) that he had not been in any way reimbursed nor shifted such burden directly or indirectly through inclusion of such amount in the price of personal property sold by him or in any other manner. 15 Ill.2d at 537, 155 N.E.2d at 598.

The court appears to have been concerned with certain limiting language found in its earlier opinion in Peoples Store of Roseland v. McKibbin, 379 Ill. 148, 39 N.E.2d 995 (1942). In *Peoples Store*, a merchant sought to recover taxes paid under the Retailers' Occupation Tax Act for sales alleged to be exempt. The case was brought as a class action on behalf of all other merchants who paid the tax. The court held that the action was not a proper class action because, while all members of the class had a common interest in determining whether the sales were exempt from the tax, a favorable decision on that point would not establish the existence of the right to recovery in every other seller. In fact, each member would have to establish that he met other individual prerequisites for recovery under the refund statute, specifically, that he actually bore the burden of the tax and did not include the tax in his sales price and in no other way passed on the tax. *Id.* at 154, 39 N.E.2d at 998. By properly viewing *Harrison* as a restitution case, the court was able to avoid contradicting *Peoples Store*.

The same approach was taken by the appellate court in Cohon v. Oscar L. Paris Co., 17 Ill.App.2d 21, 149 N.E.2d 472 (1st Dist. 1958), a case very similar to *Harrison*. In that case, the defendant was a retailer of carpeting. On its bills it charged its customers a tax based on the Retailers Occupation Tax Act, although it had obtained a refund for these taxes on the basis that the taxes were not authorized. Not only did the defendant refuse to repay the funds to its customers, but it continued to make the same charges on future sales.

With respect to the class action allegation of the complaint, the court held that a class action was proper because the same questions of law and fact were involved in every class member's claim.

> The only issue presented to the court is, did the various customers of the defendant pay to it a sum of money separately listed as a tax upon the bills which had been rendered to them and which defendant is now seeking to retain although the tax had been wrongfully collected?

Id. at 34, 149 N.E.2d at 479. *See also* Cook v. Cohn, 25 Ill.App.2d 330, 166 N.E.2d 614 (1st Dist. 1960).

49. 39 Ill.2d 531, 236 N.E.2d 698 (1968).

50. ILL. REV. STAT. ch. 120, §§439.202-439.121 (1975).

bers involved in over 1,000 different retail businesses seeking recovery of more than thirty-nine million dollars. Even though all of these retailers paid the tax, arising from numerous, separate transactions, the court found that the common and dominant theme was the constitutionality of the tax. The court made this finding even though it would be necessary for all class members to show that they in fact paid the tax, the amount of their payment, and that they had not passed on the tax burden.[51] Since *Fiorito*, courts have routinely permitted cases challenging the legality of state and local taxes to be litigated on behalf of a class, despite the existence of individual issues. These cases are almost classic Illinois class action cases, with the "dominant and pervasive issue" being the legality of the tax.[52]

Obviously, in many class action suits there will be, in addition to certain individual claims, certain individual defenses that may be asserted against some class members. These defenses or claims may be separate and independent from the common and central issues. However, this fact is insufficient to defeat the action where the claims of the class are based on common factual circumstances, governed by common legal principles.[53]

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51. In limiting the force of the prior *Roseland* opinion, the court stated:

> In cases decided subsequent to *Roseland*, courts, uniformly applying the basic criterion of a community of interest in the subject matter of the suit and the remedy requested, have upheld the use of a class action in a variety of situations (citations omitted), including taxpayer suits to restrain the enforcement of allegedly invalid taxing acts or to recover payments made thereunder . . . .
>
> Here, as in *Harrison*, there is a common fund and common factual and legal issues, the most important being the constitutionality of the 1967 amendments. Also, in view of this dominant issue, the differences which defendants contend exist between members of the class with respect to their right and amount of recovery from the fund are not sufficient to bar the instant action.

39 Ill.2d at 543-44, 236 N.E.2d at 705-06.

52. Dee-El Garage v. Korzen, 53 Ill.2d 1, 289 N.E.2d 431 (1973).

A more recent case was brought on behalf of all owners of cooperative apartment buildings in Cook County challenging the classification of these apartment buildings for assessment and real estate tax purposes. The Circuit Court of Cook County, Judge Daniel J. Covelli, held that the action could be maintained as a class action even though once the common claim was established, i.e., the unconstitutionality of the classification system, each apartment owner would have to show the market value of his individual unit to establish the overassessment. The parties established court-approved formulas for ascertaining value which disposed of literally hundreds of claims. In the few instances in which there was a dispute between the parties as to the measure of full value, the court was required to resolve the issue. Bellmore Apts. v. Cullerton, 73 CH 3697 (Cir. Ct. Cook Cty. 1974).

53. As the court stated in Harrison Sheet Steel Co. v. Lyons, 15 Ill.2d 532, 538, 155

The comparative analysis between dominant common issues and individual issues is often the center of dispute in cases where liability is based on allegations of fraud. These cases usually involve the contents and nature of a defendant's statements or conduct or the victim's reliance thereon.[54] Numerous federal courts have held that a class of claimants share an adequate common question in fraud cases where a common scheme is present, even if individual issues such as reliance remain to be litigated.[55] Consequently, where a defendant has caused a series of misrepresentations, all finding different and varied victims, federal courts have found common questions of fact or law if the alleged misrepresentations are part of a common scheme or course of conduct.[56] However, in determining whether the common issues in fraud cases are "dominant and pervasive" the Illinois courts may require a common writing such as a form solicita-

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N.E.2d 595, 598 (1959):

> [t]he hypothetical existence of individual issues is not a sufficient reason to deny the right to bring a class action. Where it appears that the common issue is dominant and pervasive, something more than the assertion of hypothetical variations of a minor character should be required to bar the action (citations omitted). The company's opportunity to defend any individual issues that may arise will not be impaired, and it can hardly be said that it will suffer greater inconvenience by litigating those issues in a single action instead of in separate actions.

Id. at 538.

The same reasoning has been applied by the court in cases decided subsequent to *Harrison*. *See, e.g.*, cases cited in note 13 *supra*.

An illustrative factual application of this principle is found in Rosen v. Village of Downers Grove, 19 Ill.2d 448, 167 N.E.2d 230 (1960). There the Village adopted an ordinance which required as a condition to the approval of a subdivision plan, that the subdivider pay a fee to the Board of Education. A class action was brought on behalf of all subdividers required to pay the fee. The defendants contended that because many subdividers made voluntary payments to the Board of Education, their claims were barred on the existence of these defenses. The supreme court viewed these defenses as "subsidiary issues" compared to the central and dominant issues in the case, which were "the validity of the ordinance and the legality of the procedures adopted by [the Village]." *Id.* at 456, 167 N.E.2d at 235.

54. *See, e.g.*, Kruse v. Streamwood Util. Corp., 34 Ill.App.2d 100, 180 N.E.2d 731 (1st Dist. 1962). *See also* Herbst v. Able, 47 F.R.D. 11 (S.D. N.Y. 1969), *as amended*, 49 F.R.D. 286 (1970); Green v. Wolf Corp., 406 F.2d 291 (2d Cir. 1968).

55. *See, e.g.*, Green v. Wolf Corp., 406 F.2d 291 (2d Cir. 1968); Mersay v. First Republic Corp. of America, 43 F.R.D. 465 (S.D. N.Y. 1968); Epstein v. Weiss, 50 F.R.D. 387 (E.D. La. 1970).

56. *See* Mascolo v. Merrill, Lynch, Pierce, Fenner & Smith, Inc., 61 F.R.D. 481 (S.D. N.Y. 1973); *In re* Memorex Sec. Cases, 61 F.R.D. 88 (N.D. Cal. 1973); Fischer v. Kletz, 41 F.R.D. 377 (S.D. N.Y. 1966).

tion or form contract as opposed to a course of separate and independent dealings with each class member.[57] Thus, a "common scheme" may be insufficient, unless it is carried out with a common apparatus.

For example, in *Kimbrough v. Parker,*[58] the court permitted a class action to proceed on behalf of 3,300 persons who had made payments to defendants in order to qualify for a contest promising various premiums and prizes to the winners. Class members entered the contest by responding to a newspaper advertisement printed identically in various newspapers throughout the country. However, the contest was a sham. On appeal, defendants urged that no class action for fraud was maintainable because the fraud was personal to each plaintiff and, therefore, the issues were not sufficiently common. The court rejected that contention, concluding that "[t]he inducements were substantially the same for all contestants since there *were no personal solicitations.*"[59] Subsequently, in *Kruse v. Streamwood Utilities Corp.,*[60] the court unequivocally rejected the contention that fraud claims are not suitable to class adjudication.[61] *Kruse* involved fraudulent concealment and misrepresentations in the sale of parcels of real estate. The defendants sought to limit the reasoning of *Kimbrough* to cases where the representations made to the class members were identical. However, the court refused to limit *Kimbrough,* noting that class actions may be upheld where the defendants are charged with a conspiracy or concerted plan to defraud the plaintiffs.[62] The court also concluded that since it could have been inferred from the pleadings that the cause of action lay in contract rather than based upon fraudulent misrepresentation, the class action would be upheld.[63]

57. *See* Kruse v. Streamwood Util. Corp., 34 Ill.App.2d 100, 180 N.E.2d 731 (1st Dist. 1962); Rice v. Snarlin, Inc., 131 Ill.App.2d 434, 266 N.E.2d 183 (1st Dist. 1970). *See also* Morris v. Burchard, 51 F.R.D. 530 (S.D. N.Y. 1971). *But see* Rodriguez v. Credit Systems Specialists, Inc., 17 Ill.App.3d 606, 308 N.E.2d 342 (1st Dist. 1974) (class action permitted where there were similar transactions but separate contracts).

58. 344 Ill.App. 483, 101 N.E.2d 617 (1st Dist. 1951).

59. *Id.* at 486, 101 N.E.2d at 618 (emphasis added).

60. 34 Ill.App.2d 100, 180 N.E.2d 731 (1st Dist. 1962).

61. *Id.* at 109, 180 N.E.2d at 734.

62. *Id.* at 107, 180 N.E.2d at 734, *citing* Hale v. Allinson, 188 U.S. 56 (1903); Abbott v. Loving, 303 Ill. 154, 135 N.E. 442 (1922); City of Chicago v. Collins, 175 Ill. 445, 51 N.E. 907 (1898); Wilkinson v. Heberling, 231 Ill.App. 516 (3d Dist. 1923).

63. 34 Ill.App.2d at 108, 180 N.E.2d at 735. *See also* Steinberg v. Chicago Medical

In *Rice v. Snarlin,*[64] the court was similarly concerned with the existence of a common prospectus or apparatus. In *Rice,* the defendants solicited young models to pay a fee for listing in a directory to be sent to businesses that might need models in their advertising and promotion. The plaintiffs alleged that the promised directory was merely an advertising flyer sent to randomly selected companies that may have no need for the services of a model. The claimed common question was whether a civil action for damages could be maintained under the Consumer Fraud Act.[65] This legal issue was essential to the claims of all the members of the class.[66] However, the court held that this issue was not the dominant issue in the case, because the alleged wrong was the omission and concealment of material facts that could not be confined to a form contract submitted to all class members. Since the personal solicitations might have varied from model to model, the court held that the individual issues were dominant and thus the class members did not share a central issue that would permit class adjudication.

Thus, the court, from *Kimbrough* to *Rice,* has tacitly adopted the rule that a common apparatus or form contract guarantees that the alleged misconduct is not only common to all class members, but is also the dominant and pervasive issue in the case.[67] Where separate and oral dealings are involved, however, the facts

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School, 41 Ill.App.3d 804, 354 N.E.2d 586 (1st Dist. 1976). *See* note 62 *supra.*

64. 131 Ill.App.2d 434, 266 N.E.2d 183 (1st Dist. 1970).

65. ILL. REV. STAT. ch. 121½, §261 (1975).

66. 131 Ill.App.2d at 440, 266 N.E.2d at 187.

67. The elusive nature of the "dominant and pervasive" issue concept has not been limited to fraud cases. For example, in Hagerty v. General Motors, 59 Ill.2d 52, 139 N.E.2d 5 (1974), *rev'g* 14 Ill.App.3d 33, 302 N.E.2d 678 (1st Dist. 1973), the plaintiff brought her automobile to a Cadillac agency for repairs. After the repairs were completed, she paid a bill charging her $30.05 for labor and $16.26 for materials. Included in the bill was an additional 4% based upon the retail value of the item sold. In an action sought to be prosecuted as a class action, the plaintiff contended that this was not an appropriate transaction for sales tax, which is computed on the basis of the retail value of the item sold. Rather, she argued that the auto dealer should have charged the tax determined under the Serviceman's Act, which is computed on the basis of the value of the personal property at the cost to the serviceman. The difference at issue was thirty-three cents. Thus, in order to determine the proper charge in an individual case, each transaction would have to be analyzed to determine whether the "service" or "sale" was the predominant aspect of the transaction. Consequently, the court held that since each transaction had to be analyzed there was no longer a common dominant and pervasive issue in the case and the case could not proceed as a class action.

must be more closely scrutinized to ensure that the individual issues are not the dominant issues in the case.

A Class Action is the Most Appropriate Method to Dispose of the Issues Raised in the Controversy

This prerequisite is stated in the federal rules under subparagraph (b)(3), which requires the court to find that a class action is superior to other available methods of adjudication.[68] Although this consideration is not discussed in Illinois cases, the author believes that it is implicit in state court decisions.[69] Under this prerequisite, the court determines whether a class action in a particular case can best secure the economies of time, effort, and expense, and promote uniformity of decision or accomplish other ends of equity and justice sought to be attained in these actions.[70] The court also will consider alternatives to class litigation, such as intervention and joinder, in determining whether the action should proceed as a class action.

A controlling factor is that, in many cases, the class action is the only practical means for class members to receive redress.[71] Other factors considered are the difficulties that may be encountered in maintaining a class action[72] and the desirability of concentrating litigation in a single forum.[73]

General Misconceptions Regarding Essential Prerequisites

Several cases and journals suggest that certain prerequisites may be essential to class adjudication.[74] The most common mis-

68. *See* note 8 *supra*.

69. In *Perlman* the trial court made the explicit finding that: "A class action is superior to a multiplicity of individual actions for the fair and efficient adjudication of this controversy." 70 CH 3653 (Cir. Ct. Cook Cty. 1972).

70. *See* 3B Moore's Federal Practice ¶23.45 (2d ed. 1969); 7A Wright & Miller, Federal Practice & Procedure §1779, at 60-61 (1972).

71. *See* Harrison Sheet Steel Co. v. Lyons, 15 Ill.2d 532, 155 N.E.2d 595 (1959); Kimbrough v. Parker, 344 Ill.App. 483, 101 N.E.2d 617 (1st Dist. 1951); Perlman v. First Nat'l Bank of Chicago, 15 Ill.App.3d 784, 305 N.E.2d 236 (1st Dist. 1973). *See also* Werfel v. Kramarsky, 61 F.R.D. 674 (N.D. N.Y. 1974); Ingenito v. Bermec Corp., 376 F.Supp. 1154 (S.D. N.Y. 1974).

72. *See* note 8 *supra*.

73. *Id.*

74. *See, e.g.*, Reardon v. Ford Motor Co., 7 Ill.App.3d 338, 287 N.E.2d 519 (3d Dist. 1972); Moseid v. McDonough, 103 Ill.App.2d 23, 243 N.E.2d 394 (1st Dist. 1968); *see* Peoples Store of Roseland v. McKibbin, 379 Ill. 148, 39 N.E.2d 995 (1942). *See* also

conception is that a common fund is required before an action may proceed as a class action.[75] The need for a common fund was discussed in *Perlman v. First National Bank of Chicago*.[76] In *Perlman*, the bank argued that in order to maintain a class action there must be "a sequestered fund of money easily identified and computed."[77] The court acknowledged that certain cases had discussed the presence or absence of a common fund as a basis for denying class action relief,[78] but rejected this contention, noting that it found no precedential basis for such a conclusion.[79]

The existence of a common fund is an important consideration to the extent that an existing common fund, in and of itself, will generally establish the right to proceed as a class action, due to the fact that all class members will have an interest in any litigation which affects their common fund. However, the absence of a "common fund" in a traditional sense is an attempt to defeat a class action and where the other prerequisites are all clearly present.

Another common misconception is that only courts of equity have jurisdiction to litigate class actions.[80] This suggestion follows from the history of the class action, as being a product of the court of chancery.[81] In addition, the purpose of any class action is to eliminate a multiplicity of law suits. By this fact alone, an action brought on behalf of a class is equitable in nature in that its entertainment by the court will eliminate multiple suits.[82] How-

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Tornquist, *Road Map to Illinois Class Actions*, 5 LOY. (CHI.) L.J. 45 (1974) [hereinafter cited as Tornquist]; Comment, *Class Actions in Illinois: A Viable Alternative to Federal Rule 23*, 8 J. MAR. J. PRAC. & PRO. 113 (1974).

75. A common fund is generally defined as a segregated or sequestered and identifiable sum of money held by the defendant and properly belonging to the plaintiffs and the class. *See* Perlman v. First Nat'l Bank of Chicago, 15 Ill.App.3d 798-802, 305 N.E.2d 247-50 (1st Dist. 1973).

76. *Id.*

77. *Id.* at 798, 305 N.E.2d at 247.

78. *See, e.g.*, Peoples Store of Roseland v. McKibbin, 379 Ill. 148, 39 N.E.2d 995 (1942).

79. 15 Ill.App.3d at 800, 305 N.E.2d at 249.

80. *See* DePhillips v. Mortgage Assocs., Inc., 8 Ill.App.3d 759, 291 N.E.2d 329 (1st Dist. 1972); Fox, *Representative Actions and Proceedings*, 1954 U. ILL. L. FORUM 94, 97-98 [hereinafter cited as Fox].

81. For a discussion on the historical development of class actions see IICLE, *supra* note 1, at §§1.1-1.6. *See also* Fox, *supra* note 80.

82. Winger v. Chicago City Bank & Trust Co., 394 Ill. 94, 103, 67 N.E.2d 265, 273 (1946), *quoting* Hansberry v. Lee, 311 U.S. 32, 41 (1940); *see* Boner v. Drazek, 55 Ill.2d 279, 302 N.E.2d 280 (1973); Smyth v. Kaspar Am. State Bank, 9 Ill.2d 27, 136 N.E.2d 796 (1956). *See also* Wilkinson v. Heberling, 231 Ill.App. 516 (3d Dist. 1923).

ever, with the elimination of most distinctions between law and chancery under the Illinois Constitution,[83] there is presently little basis for any distinction in class action jurisdiction.

Finally, the suggestion is sometimes made that an Illinois court does not have jurisdiction over non-resident absent class members and cannot, therefore, enter a decree that is binding on these persons.[84] This proposition is repudiated by the entire history of litigation under Federal Rule 23. The court acquires in personam jurisdiction over member of the class by virtue of its jurisdiction over the person of the representative parties.[85] In fact, this is the very concept of class or representative litigation. If a case is properly brought as a class or representative action, absent class members need not personally intervene, be served with process, or in any way appear in the action. If a representative party, appearing on behalf of the class members, is properly before the court, all class members are bound by a judgment properly entered and other states will give full faith and credit to that judgment.[86]

Nationwide classes have been upheld repeatedly when the forum district court would have no power over the residents living beyond its state.[87] The suggestion that the court in a class action cannot entertain jurisdiction over absent class members who fortuitously reside beyond the jurisdiction of the court overlooks this representative nature of the class action.

A Proposed Rule For Illinois

Despite the adequacy of the present case law, a codification of class action law is desirable. This need is due in part to the proliferation of class actions in recent years and the anticipated increase resulting from limitations imposed on federal class actions by the federal courts.[88] Furthermore, a rule would also eliminate

83. Ill. Const. art. VI, §§7, 9 (1970). *See also* Institute of Government & Public Affairs, The Illinois Constitution: An Annotated and Comparative Analysis (1969).

84. *See* Tornquist, *supra* note 74.

85. *See* Appleton Elec. Co. v. Advance-United Expressways, 494 F.2d 126, 139-40 (7th Cir. 1974).

86. *See* Larson v. Pacific Mut. Life Ins. Co. of Cal., 373 Ill. 614, 27 N.E.2d 458 (1940).

87. *See, e.g.*, Appleton Elec. Co. v. Advance United Expressways, 494 F.2d 126 (7th Cir. 1974); West Virginia v. Chas. Pfizer & Co., 440 F.2d 1079 (2d Cir. 1971), *cert. denied*, 404 U.S. 871 (1971); Kimbrough v. Parker, 344 Ill. App. 483, 101 N.E.2d 617 (1st Dist. 1951); Holstein v. Montgomery Ward & Co., [1970] Pov. L. Rep. (CCH) ¶ 12,50 (Cir. Ct. Cook Cty. 1970).

88. *See* notes 9-12 and accompanying text *supra*.

any misconceptions regarding the requirements for maintaining a class action and the uncertainty inherent in any legal question that is based solely upon case law.

The author submits that any codification should be based upon the principles that have evolved from our state court decisions. Where variances or additions are deemed necessary, we should refer to the experience of the federal courts. Consequently, the court and counsel will have the benefit of volumes of decisions, interpreting and applying these provisions. However, the federal rule with respect to notice[89] should not be adopted. Rather, the Illinois statute, providing that an action may not be compromised or dismissed without notice,[90] should be expanded to authorize the trial court to require notice to the class at any time and under any circumstances where the court determines that notice is necessary in order to properly protect the interests of the class or the parties.

Class Actions

Sec. 1. Prerequisites for the Maintenance of a Class Action

(a) An action may be maintained as a class action in any court of this state and a party may sue or be sued as a representative party of the class only if the court finds:

(1) The class is so numerous that joinder of all members is impracticable.
(2) There are questions of fact or law common to the class, which common questions predominate over any questions affecting only individual members.
(3) The representative parties will fairly and adequately protect the interests of the class.
(4) The class action is an appropriate method for the fair and efficient adjudication of the controversy.

89. FED. R. CIV. P. 23(c)(2). Federal Rule 23(c)(2) provides in relevant part:

(2) In any class action maintained under subdivision (b)(3) the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude him from the class if he so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if he desires, enter an appearance through his counsel.

90. ILL. CIV. PRAC. ACT §52.1.

Comment: Section 1 of the Act provides first that an action may be maintained as a class action in *any court* of this state. This reference is intended to eliminate the misconception that a class action may be maintained only in the courts of equity.[91] Also implicit in this term is that a court entertaining a class action may enter declaratory, injunctive or monetary relief.

The reference in that same section to the fact that a party may sue *or be sued* makes it clear that a representative party may be named as a defendant and be required to defend as and on behalf of a defendant class. In this respect, the rule is identical to the federal rule and is consistent with present Illinois practice. However, the distinction between a defendant class and a plaintiff class requires special consideration. With respect to a plaintiff class, the class sought to be certified generally seeks to recover money damages or other relief on behalf of the absent class members. In many of these cases the individual relief sought is small and in all probability would not be pursued at all, but for the class action. Where there is a defendant class, the aim of the parties is to impose liability upon the absent class members. Because of this distinction, courts have been much stricter in applying the prerequisites, particularly with respect to the adequacy of the representation by the named party.[92] The circumstances where a defendant will be permitted to defend an action as a representative party on behalf of the defendant class will be rare. Nevertheless, there may be circumstances when such representation does meet with the ends of justice. For this reason, a provision is made for this possibility.

The first prerequisite is identical with the federal rule and present Illinois law. The use of the precise language found in the federal rule will permit the courts to look to the federal decisions for guidance on this issue.

The second prerequisite, that there be questions of law common to the class which predominate over any individual questions, adopts almost verbatim the language of Federal Rule 23 (b)(3). The adoption of this language from the federal rule is a departure from the language utilized by Illinois courts requiring that there be common questions of fact or law which are

91. *See* text accompanying notes 80-83 *supra*.

92. *See, e.g.*, Gaffney v. Shell Oil Co., 19 Ill.App.3d 987, 312 N.E.2d 753 (1st Dist. 1974).

"dominant and pervasive" or that there be a "community of interest in the subject matter and the remedy."[93] In departing from the language of the Illinois cases, it is not suggested that a different standard be adopted. As noted previously, in comparing the federal rule with the Illinois cases, the bottom line is basically the same.[94] However, the terms used in the Illinois cases have been the single most difficult area the courts have encountered in their attempts to apply Illinois law. The federal rule may prove to be less elusive in concept and application.

The third prerequisite, that the representative parties fairly and adequately represent the class, is identical to the federal rule and current practice in Illinois.[95] The fourth prerequisite, that the class action be the most appropriate method of adjudicating the controversy, is currently the law of Illinois[96] and must be included, explicitly or implicitly, under any rule or procedure which vests such substantial discretion with the court. The same basic provision is found in subparagraph (b)(3) of the federal rule except that under that rule the court must find that the class action is "superior to other available methods" for the fair and efficient adjudication of the controversy.[97] The proposed rule gives the trial court more discretion in determining whether to permit the class action to proceed.

Readers conversant with the federal rules may note that the federal rule prerequisite that "the claims or defenses of the representative parties are typical of the claims or defenses of the class"[98] has not been included. This has intentionally been omitted because the federal cases interpreting the federal rule have found this prerequisite to be included in the other prerequisites requiring "common questions" and "adequate representation."[99]

93. *See, e.g.*, Harrison Sheet Steel Co. v. Lyons, 15 Ill.2d 532, 538, 155 N.E.2d 595, 598 (1959) (dominant and pervasive); Smyth v. Kaspar Am. State Bank, 9 Ill.2d 27, 44, 136 N.E.2d 796, 805 (1956) (community of interest in the subject matter and the remedy).

94. *See* text accompanying notes 40-44 *supra*.

95. *See* text accompanying notes 30-39 *supra*.

96. *See* note 69 *supra*.

97. *See* note 8 *supra*.

98. *Id.*

99. *See* Perlman v. First Nat'l Bank of Chicago, 15 Ill.App.3d 784, 798, 305 N.E.2d 236, 247 (1st Dist. 1973).

Section 2. Order and Findings Relative to the Class.

(a) Determination of Class. As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it may be so maintained and describe those whom the court finds to be members of the class. This order may be conditional and may be amended before a decision on the merits.

(b) Class Action on Limited Issues and Sub-classes. When appropriate, an action may be brought or maintained as a class action with respect to particular issues, or divided into sub-classes and each sub-class treated as a class. The provisions of this rule shall then be construed and applied accordingly.

(c) Appeals. Any order of court either granting or denying class adjudication in a given case may be appealed as a matter of right, within 30 days of said order, or upon a judgment on the merits.

Comment: Section 2 requires that the class action question be resolved promptly, "as soon as practicable after the commencement of the action." This is identical to the federal rule and puts the burden on the party seeking to bring the action on behalf of a class to bring the matter before the court for such a determination. There is no present provision under Illinois law and in some respects this is one of the deficiencies in the Illinois practice. Under current Illinois law, a case may pend indefinitely, or even be tried on the merits, without a determination as to whether the case is properly brought as a class action.

Section 2(a) provides that a class action order may be "conditional and may be amended before a decision on the merits." This language is identical to that found in the federal rule and is consistent with state practice. It merely gives the trial court the discretion to condition or amend its order as facts and circumstances may dictate. Section 2(b) authorizes the court to limit litigation of class actions to particular issues in the case or to divide the class into sub-classes. Again the language is identical to that found in the federal rule and state court judges are undoubtedly vested with the same inherent discretion under current law. Section 2(c) authorizes the appeal of any order either granting or denying class adjudication. There is no similar provision in the federal rules, and, as explained below, the absence of such

a provision has been one of the most unsatisfactory aspects of the federal experience.

As a general proposition, an order by the trial court granting or denying class action status is not a final and appealable order since it does not determine the final disposition of all claims of all parties to the lawsuit.[100] If class certification is denied, the class proponent must either suffer the dismissal of his case or prosecute an inconsequential individual claim. If class certification is granted, the party opposing the class has no choice but to proceed with the defense of the action.

Pending the argument of the ultimate appeal on the class action questions, the parties do not know whether they are litigating an individual claim for a relatively few dollars or the claims on behalf of a large class which may involve millions of dollars. Because of the obvious desirability of resolving the class action question before the case is litigated on the merits, various theories have developed permitting appeal.[101] But there has been no uniformity in the application of these principles by the courts.[102]

Generally, orders approving class litigation have been held not appealable.[103] Appeals have been permitted from orders denying class adjudication under various theories. Under certain circumstances, courts have permitted appeal on the theory that, for practical purposes, the denial of the class motion terminates or sounds the "death knell" for the plaintiff's case.[104] In other cases, appeal is permitted under the "collateral order doctrine." This doctrine permits appeal from an order "which finally determines claims of rights separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated."[105] In cases involving injunctive relief, some courts have interpreted the denial of class action status as an order denying injunctive relief appealable by statute.[106]

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100. *See* FED. R. CIV. P. 54(b); IICLE, *supra* note 1, at §§5.11, 5.15.

101. *See* Anshul v. Sitmar Cruises, Inc., ___ F.2d ___ (7th Cir. 1976); IICLE, *supra* note 1, at §§5.11-5.15; 7A WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE §1802.

102. *See* note 101 *supra.*

103. New Orleans Pub. Serv., Inc. v. Power Div. Assoc., ___ F.2d ___ (5th Cir. 1976).

104. *Id.*

105. *Id. See also* Cohen v. Beneficial Indust. Loan Corp., 337 U.S. 541 (1949).

106. 28 U.S.C. §1292(a)(1) (1971); IICLE, *supra* note 1, at §5.14.

Other courts have permitted appeal where the issue is certified for appeal by the trial court. However, the success of any of these methods of appeal is uncertain. A most convincing argument in support of permitting appeals in all cases has been made by Judges Luther M. Swygert and William J. Bauer of the Seventh Circuit Court of Appeals in their dissenting opinion in *Anshul v. Sitmar Cruises, Inc.*:[107]

> The spirit as well as the purpose of the rule would be better served by such interlocutory review. That spirit and purpose should not be frustrated by an unarticulated and perhaps subconscious hope on the part of appellate judges that if review of important class action determinations are delayed until the merits of the suit have been decided, the question of such class determination may be mooted and difficult questions avoided. The rights involved in the certification of a class action are simply too important to be left to chance.[108]

Any codification of a class action procedure in Illinois should include such a provision authorizing immediate appeal. Under the proposed rule, a party aggrieved by a class action determination order does not waive his right to appeal the issue by failing to seek interlocutory review. Rather, he has the alternative of waiting for a decision on the merits.

Section 3. Notice.

Upon a determination that an action may be maintained as a class action, or at any time during the conduct of the action, the court in its discretion may order such notice that it deems necessary to protect the interests of the class and the parties.

An order entered under section 2(a) above, determining that an action may be maintained as a class action, may be conditioned upon the giving of such notice as the court deems appropriate and this condition, and the reasonableness thereof, is appealable in the same manner as the class determination order under section 2(c) above.

Comment: One of the most serious drawbacks of the federal rule is the requirement that, in all actions brought under subparagraph (b)(3), personal notice must be sent to each and every

107. 544 F.2d 1369 (7th Cir. 1976).
108. *Id.* at 1373.

reasonably identifiable member of the class.[109] Moreover, the party who represents the class must bear the initial cost of that notice. Generally, it is presumed that the cost of this notice ultimately will be taxed as other costs in the case and borne by the losing party.[110] Still, the initial outlay of these costs makes the maintenance of a class action a practical impossibility. Considering the small claims involved, it is obvious that leading Illinois cases such as *Harrison* and *Kimbrough* would never have been initiated if notice to every conceivable class member had been required. In this regard, Rule 23(c)(2) as interpreted by the current Supreme Court, sounds the deal knell for federal class actions brought to recover small claims.

The proposed rule set forth above, while recognizing that there are circumstances where notice may be appropriate, does not arbitrarily compel notice in every case. Where the claims are relatively substantial, the class reasonably identifiable and not exceptionally large or where other considerations call for notice, the trial court in its discretion may order that notice of the pendency of the action be given to the members of the class. Similarly, the nature, extent and contents of such notice are left largely within the discretion of the court.

This proposal is essentially consistent with present Illinois law.[111] At present there is no notice requirement. The only reference to notice in class actions is found in Section 52.1 of the Civil Practice Act[112] which provides for notice to the class, except if excused for good cause, before any action shall be compromised or dismissed. In all other instances, and even though all members of the class are bound by the court's decree,[113] individual notice to the absent class members is not required. To insure due process, the courts look to the adequacy of the representation of absent class members by the representative parties.[114] This repre-

109. *See* note 8 *supra*.

110. Lamb v. United Security Life Co., 59 F.R.D. 25, 42 (S.D. La. 1972); Cole v. Schenley Industries, Inc., 60 F.R.D. 81, 86-87 (S.D. N.Y. 1973).

111. *See* cases cited in note 114 *infra*..

112. ILL. REV. STAT. ch. 110, §52.1 (1975); *see* text accompanying note 14 *supra*.

113. Fisher v. Capesios, 369 Ill. 598, 17 N.E.2d 563 (1938); South East Nat'l Bank v. Board of Educ., 298 Ill. App. 92, 18 N.E.2d 584 (1st Dist. 1938); Schmidt v. Modern Woodmen of America, 261 Ill. App. 276 (4th Dist. 1931).

114. Newberry Library v. Board of Educ., 387 Ill. 85, 55 N.E.2d 147 (1949); State Life Ins. Co. v. Board of Educ., 384 Ill. 301, 68 N.E.2d 525 (1946).

sentation is further guaranteed when the court is satisfied that the representative parties and all the class members share a community of interest in the subject matter of the litigation and in the remedy proposed.

The distinctions between the notice requirements of the federal rules and Illinois state practice were recently discussed by the Illinois Supreme Court in *People ex rel. Wilcox v. Equity Funding Life Insurance Co.*[115] Although the issue regarding notice was not resolved upon appeal,[116] the court noted that *Eisen* was decided under Federal Rule 23 (c)(2).[117] Thus, the court stated that "[n]either §52.1 of the Civil Practice Act nor the requirements of due process as suggested in *Eisen*, require individual notice to all members of the class in all circumstances."[118]

A review of prior cases supports the conclusion of the court. The test of due process in Illinois always has been whether the interests of absent parties have been adequately protected by the representative party. As stated by the Illinois Supreme Court in *Newberry Library v. Board of Education*:[119]

> [T]he test is whether those sought to be bound as members of a class are in fact adequately represented by the parties who actually participate in the conduct of litigation in which members of the class sought to be bound, are not present as parties . . . or where the interest of the members of the class, some of whom are present as parties, is joint, or where for any reason the relationship between the parties present and those absent is such as legally to entitle the former to stand in judgment for the latter.[120]

The Illinois approach obviously makes sense. Representation by a vigorous advocate urging the cause of an identically situated party is greater insurance of due process than an expensive ad in the Wall Street Journal, which seldom is read by those with small claims on whose behalf most class actions are brought.[121]

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115. 61 Ill.2d 303, 335 N.E.2d 448 (1975).

116. The Illinois court held that the sufficiency of the notice was not properly raised in the trial court and therefore could not be raised on appeal.

117. 61 Ill.2d 303, 311, 335 N.E.2d 448, 453 (1975).

118. *Id.* at 312, 335 N.E.2d at 454.

119. 387 Ill. 85, 55 N.E.2d 147 (1944).

120. *Id.* at 90-91, 55 N.E.2d at 151 (citations omitted). *See also* State Life Ins. Co. v. Board of Educ., 394 Ill. 301, 68 N.E.2d 525 (1946).

121. Rule 23(c)(2) of the Federal Rules requires that the court give the class "the best

Section 4. Intervention by and Exclusion of Class Members.

(a) Intervention. Any class member seeking to intervene or otherwise appear in the action may do so with leave of court and said leave shall be liberally granted except when the court finds that said intervention will disrupt the conduct of the action or otherwise prejudice the rights of the parties or the class.

(b) Exclusion. Any class member seeking to be excluded from a class action may request such exclusion and any judgment entered in the action shall not apply to persons who properly request to be excluded.

Comment: Section 4 first provides that absent class members may intervene in a class action when their rights are to be litigated. This is consistent with current practice in both the federal and state courts.[122] Section 4 also provides that any member of the class may be excluded from the class if he does not want his rights adjudicated in the representative action. Consequently, he will not be bound by the judgment and will not be prevented from bringing his own action. This, too, is currently the federal law[123] and is also a part of the judicially evolved law of Illinois.[124]

The "exclusion" provision also raises a problem with respect to notice. Proponents of a broad use of notice will contend that the right to exclusion is a hollow right unless a very thorough and individual notice provision is adopted. They reason that a class member cannot request to be excluded from a class action unless

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notice practicable under the circumstances" in any actions brought under subparagraph (b)(3) of Rule 23. Often notice by publication is ordered either as a supplement to the individual notice sent to members who have been identified or as a primary form of notice. However, one federal court has warned that "ritualistic small print [in] a newspaper would in no event suffice." Eisen v. Carlisle & Jacquelyn, 391 F.2d 555, 569 (2d Cir. 1968). *See* discussion in Herbst v. Able, 49 F.R.D. 286, 287 (S.D. N.Y. 1970); Berland v. Mack, 48 F.R.D. 121, 130 (S.D. N.Y. 1969).

122. FED. R. CIV. P. 23(d)(3). *See, e.g.*, Rosen v. Bergman, 40 F.R.D. 19 (S.D. N.Y. 1966); ILL. REV. STAT. ch. 110, § 26.1 (1975).

123. *See* Rule 23(c)(2) and (3) which provides that, in any action brought under subparagraph (b)(3) of the Federal Rule, class members may request exclusion from the class. Then, they will not be bound by any judgment entered in the case. In actions brought under subparagraphs (b)(1) and (b)(2), there is no right to request exclusion. Airline Stewards & Stewardesses Ass'n v. American Airlines, 490 F.2d 636 (7th Cir. 1973). However, as noted above, the great bulk of commercial cases are included in the (b)(3) category.

124. Ross v. City of Geneva, 357 N.E.2d 829, 835 (1976) (right to opt out inherent in Illinois law); *see* cases cited in note 113 *supra*.

he has been given notice that it is pending. However, this question relates back to the sound discretion of the court in determining what notice is appropriate in a given case. Where the proposed class of claimants is large and their claims relatively small, these class members do not have a substantial interest in requesting exclusion from the class. As a practical matter, they have nothing to lose in the litigation. Moreover, the possibility of a strict notice requirement eliminates the action in its entirety. But under the proposed rule, where the claims are substantial or where a defendant class is proposed, a court may consider the significance of the right to request exclusion, and require appropriate notice.

Section 5. Judgment.

Any judgment entered in a class action brought under this rule shall be binding on all class members, as the class is defined by the court, except those who have been properly excluded from the class under section 4(b) above.

Comment: The most essential portion of any class action rule is the determination as to who will be bound by a judgment entered in the action. The early cases generally agree that any decree entered in a class action is binding on all members of the class as if they were before the court.[125] The Illinois courts have consistently followed this principle.[126] However, the federal courts deviated from this established procedure for a score of years with the adoption of the 1938 version of Rule 23.[127] The application of this rule, which remained in effect until the adoption of the present rule in 1966, resulted in the categorization of class actions as "true," "hybrid" and "spurious" and the results in any given case were dependent upon the categorization by the court.[128]

125. Smith v. Swormstedt, 57 U.S. 288, 303 (1853).

126. *See* Fisher v. Capesios, 369 Ill. 598, 604-05, 17 N.E.2d 563, 566 (1938). *See also* South East Nat'l Bank v. Board of Educ., 298 Ill. App. 92, 18 N.E.2d 584 (1st Dist. 1938); Schmidt v. Modern Woodmen of America, 261 Ill. App. 276 (4th Dist. 1931).

127. FED. R. CIV. P. 23 (1938).

128. *See* 7 WRIGHT & MILLER, FEDERAL PRACTICE & PROCEDURE §1752, at 512 (1972), in which the authors point out that the application of the rule was so uncertain that examples could be cited where two or more courts, or the same court at different times, applied different labels to the same case.

The "true" category is generally defined as involving a joint, common or secondary right. The "hybrid" category involves "several" rights relating to specific property, and the "spurious" category involves several rights affected by a common question and related

In a "spurious" action, which is the category most resembling suits brought under present Rule 23(b)(3), absent class members were not bound, and could claim no benefit, from a favorable judgment unless they took some positive act to participate in the action prior to a decision on the merits. In other words, these absent class members were required to intervene and become parties to the action if they were to be affected by a judgment. Thus, though designated a class action, the spurious action was not a class or representative action at all as it did not adjudicate the rights or liabilities of absent parties.[129] This factor was one of the most unsatisfactory aspects of the prior rule. Obviously class members, particularly small claimants, were reluctant to join in litigation. The expense of counsel alone would often exceed their claim.

This aspect of federal practice was changed, under the modern Rule 23. Under subparagraph (b)(3) of that Rule all members of the class, as defined by the court, are bound by any judgment in the action unless they take positive steps to be excluded. The Illinois courts never accepted the concept of a "spurious" action, but consistently held that in any representative suit, members of the class are bound by any final judgment therein.[130]

The proposed rule set forth above retains the binding effect as to all class members whether they intervene or not. This proposal avoids the mistake made by the drafters of the 1938 Federal Rules which established the "spurious" class requiring intervention.

It seems imperative at this point to warn that there have been some attempts to bring the "intervention" concept back into the federal rules by requiring absent class members to "opt-in" to the action if they propose to claim its benefits.[131] Thus, a class proponent would be required to give notice to all absent members and absentees would not be bound by or benefit from the action,

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to common relief. The most important distinction between the categories is that while the judgments in true and hybrid class actions extend to and bind the class, the judgment in a spurious class action extends only to parties and actual intervenors. *See* Notes of Advisory Committee on 1966 Amendment to Rules; Moore, *Federal Rules of Civil Procedure; Some Problems Raised by the Preliminary Draft,* 25 GEO. L.J. 551, 570-76 (1937).

129. *See* Notes of Advisory Committee, *supra* note 128. *See also* Simon, *Class Actions Under Amended Rule 23,* 111 ANTITRUST BULLETIN 187 (1966); 7A WRIGHT & MILLER, FEDERAL PRACTICE & PROCEDURE §1789 (1972).

130. FED. R. CIV. P. 23(b). 7A WRIGHT & MILLER, FEDERAL PRACTICE & PROCEDURE §1789, at 175-76; IICLE, *supra* note 1, at §2.7.

131. *See* IICLE, *supra* note 1, at §5.19.

unless they took some affirmative step to participate, prior to an adjudication on the merits. This "intervention" procedure would emasculate all class actions where the individual claims are small because these claimants are generally unsophisticated in legal matters and will be reluctant to *participate* in litigation. However, these same persons would enthusiastically file a claim if a successful judgment was obtained on their behalf.

This issue was recently taken up by a distinguished committee on the New York City Bar Association in connection with a study of the federal rule. The Committee concluded that a general requirement that absent class members "opt-in" or file proofs of claim prior to settlement or judgment would adversely curtail the impact of class actions without corresponding benefit.[132] The "opt-in" or "intervention" rule should not be adopted in Illinois. In the interests of all parties, a judgment should bind all class members as the class is defined in a given case, except those who have requested to be excluded from the case.

Section 6. Dismissal or Compromise.

Any action brought as a class action under this rule shall not be compromised or dismissed except with the approval of the court and, unless excused for good cause shown, upon notice as the court may direct.

Comment: This provision is the same as section 52.1[133] of the Illinois Civil Practice Act and is very similar to the federal rule.[134] The purpose of the statute is to protect the interests of non-party class members from unfair or inequitable settlements which will affect their rights.[135] As guardian of the interests of the class, the court must evaluate the merits of the settlement and consider whether notice should be first sent to absent class members before a compromise is approved or the case is dismissed.

CONCLUSION

The current law of Illinois, built firmly on more than a century of case law, and resting principally upon the sound discretion of

132. *See* PRACTICING LAW INSTITUTE, PROSECUTING AND DEFENDING STOCKHOLDERS SUITS AND CLASS ACTIONS 435, 445 (1975).

133. ILL. CIV. PRAC. ACT § 52.1.

134. FED. R. CIV. P. 23(e).

135. *See* IICLE, *supra* note 1, at ch. 6.

the trial court, has worked well to vindicate the rights of a class when their claims are based on common ground. Because of this overall favorable experience, a convincing argument could be made against any form of codification. Nevertheless, in the opinion of this author, a codification, by statute or Supreme Court Rule, would eliminate some of the uncertainties, particularly with respect to the ancillary issues that presently arise in class litigation. Questions such as where a case may be filed, what types of actions are susceptible to class litigation, and whether an appeal can be taken from class action certification rulings, are questions that can be resolved by the adoption of a formal statute or rule.

The proposed rule submitted with this Article draws on the author's research and experience in both the federal and state courts. Further suggestions will undoubtedly be made in legislative proceedings or in the court's consideration of the subject matter.

It is universally recognized that the concept of class action is an essential tool for litigating the rights of small claimants lest the doors of justice be closed to all such claims. The adoption of a statute or court rule will enable the Illinois state courts to be a more attractive forum for this essential remedy.